

The First Day of Criminal Law: Forgetting Everything You Thought You Already Knew

Kami Chavis Simmons*

Law school presents many challenges, not the least of which is the large body of legal doctrines that students must digest in the first year of law school. The rule against perpetuities in Property, subject matter jurisdiction in Civil Procedure, unconscionability in Contracts and getting to know the “reasonable person” in Torts, will occupy much of the first-year law student’s life. At first glance, Criminal Law seems different. Whether from the media or the seemingly endless rotation of *Law and Order* episodes, many students enter law school with a great deal of knowledge about important concepts that dominate Criminal Law, including murder, manslaughter, conspiracy, self-defense, or insanity. This familiarity with criminal law presents a dual challenge for students and professors alike. First, as future lawyers, they must force themselves to think critically about these familiar topics, and despite their basic knowledge of the criminal justice system, students quickly learn that there is much more to criminal law than meets the eye. Second, part of this critical analysis requires students to shed any preconceived notions about the criminal justice system they may have acquired. For my students, this means appreciating that criminality exists in all sectors of society and is not reserved for any particular race, gender, or socioeconomic class. Armed with knowledge of criminal law and its principles, my hope is that they will develop their own ideas about making our great justice system better.

In order to introduce these concepts, I begin the first day of Criminal Law with an interactive exercise to debate the merits of criminal prosecution and punishment involving a scenario plucked from the headlines of a modern news story. For the first of many times during the semester, I divide the class into two groups: prosecutors and defense attorneys. The exercise encourages students to think about many questions we will consider during the course of the semester. How do we define “crime” or “punishment”? What are the goals of punishment, and how much punishment is enough to accomplish these goals? Why punish someone who encouraged or assisted a criminal actor but did not actively participate in the crime? Are there any circumstances about the individual or the situation that might warrant exoneration or leniency? Throughout the hour, we slowly peel back the intricate layers of the scenario to reveal some of the complexities and confounding principles of criminal law.

One useful exercise is based on Dr. Philip Nitschke, an Australian physician who assisted individuals with suicide when euthanasia was legal in Australia.¹

* Professor of Law, Wake Forest University School of Law.

Students read an article or a short factual scenario about this physician who regularly conducted workshops on helping people to end their lives. During these workshops, the doctor demonstrated the use of a device that allows a person to breathe in carbon monoxide, quickly resulting in death.² In class, I ask students to assume the doctor has traveled to the United States to present his ideas at a workshop. A terminally-ill elderly woman who attended the doctor's workshop has purchased the device and killed herself. Even though the doctor is not present during her death, and thus never operated the machine, he is arrested in connection with her death. The "prosecutors" in the class must argue that the doctor has committed a crime, and they must anticipate the range of possible criminal activity the doctor's action encompasses. This begins a thoughtful discussion on whether demonstrating the use of these devices, or selling them, *should* be a crime. We discuss whether society has an interest in preventing this behavior and whether there are sound reasons for allowing it. In the absence of any legislation before them, the class discusses what a legal prohibition on this conduct might look like. This gives students a brief idea about the considerations a legislature might debate when prohibiting conduct.

During this exercise, the "prosecutors" astutely note that the doctor's assistance in providing the machine and information about its operability was critical to the victim's death. Some students argue that the death would not have occurred when it did and in the manner it did, without the assistance of the physician. This discussion nicely foreshadows future discussions about accomplice liability and the underlying rationale for punishing those who encourage or facilitate crimes. The "defense attorneys" cleverly argue that the victim was a willing participant in her own death. There is usually a rich discussion about the merits of individual autonomy and choice.

Finally, we talk about what constitutes an appropriate punishment. As students often note, in this case, we may be less concerned about generally deterring this activity, and more concerned about specifically deterring this particular doctor from engaging in the behavior. I ask students if the doctor, who happens to be the director of a pro-euthanasia organization, needs more deterrence than a wife who administers a lethal dose of morphine to her terminally ill husband at his request. Should the doctor and the offending wife face similar or different punishments? Who is more likely to re-offend? Finally, I ask students to assume that the doctor has been convicted of a homicide. Using anonymous electronic polling, I ask students what punishment they would impose, ranging from

¹ For examples of sources to use for this exercise, see EXIT INTERNATIONAL, <http://www.exitinternational.net> (Dr. Nitschke's website for his organization, Exit International); 'Breath of Death' Suicide Machine Launched, CNN.COM, (Dec. 3, 2002), <http://archives.cnn.com/2002/WORLD/asiapcf/auspac/12/03/aust.euthanasia/index.html>; and *Australian Doctor: Suicide Device Allows Peaceful End*, CNN.COM, (Jan. 9, 2003), http://articles.cnn.com/2003-01-09/health/cnna.australia.dr.death_1_nitschke-australian-doctor-euthanasia?_s=PM:HEALTH [hereinafter *Australian Doctor*].

² *Australian Doctor*, *supra* note 1.

probation to the death penalty. I then ask volunteers to discuss their reasons for choosing punishment.³

The first day of Criminal Law is also a perfect moment to challenge many assumptions about criminality and the criminal justice system that many people harbor. To begin dispelling these notions, it is no coincidence that I begin the course with an example of a highly educated individual in the upper echelon of the socio-economic sphere, rather than a violent crime or drug offense. We revisit these themes throughout the semester and students begin to understand the role of legislatures and how crime creation impacts the administration of criminal justice.⁴ Students ponder the impact of substantive criminal law on incarceration rates and public safety. By the end of the hour, we have foreshadowed much of what we will cover during the class, and hopefully, in the time it takes to watch an episode of *Law and Order*, students are already beginning to think like a lawyer.

³ I repeat this exercise several times throughout the semester using the cases in our book, one of which is the classic *The Queen v. Dudley and Stevens* (1884) 14 Q.B.D. 273 DC (U.K.). Nearly every law school graduate can recite the facts of this case involving cannibalism on the high seas, and it is the basis of one of the most memorable discussions students will have in law school. Not only is it a memorable case, but the facts, conviction and ultimate pardon of the captain and a crew that killed and fed upon a sickly member of the bunch while they were stranded at sea, also foreshadows many of the issues that students will study during the semester: Should the three survivors be punished equally, or is one more culpable than the other? Should their conspiracy to kill the cabin boy constitute its own crime?

⁴ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 230 (2007) (the overbreadth and redundancy of certain criminal statutes enacted by legislatures provides more grounds for arrests and convictions, and can recriminalize conduct already prohibited); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 524–31 (2001) (noting the motives behind why legislatures enact certain criminal statutes and its impact on the community).

